FILED

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No. 97- 971788 MAY 4 1998

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOE DOAKES,

Petitioner,

v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

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April 1998

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

43 pp

QUESTION PRESENTED FOR REVIEW.

Whether and under what circumstances a grand jury subpoena preempts a previously issued protective order in a civil case.

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No. 97-

In The

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October Term, 1997

JOE DOAKES,

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v.

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

The petitioner Joe Doakes[1] ("Doakes") respectfully prays that a writ of certiorari issue to review so much of the judgment of the United States Court of Appeals for the First Circuit, entered on March 16, 1998, as upholds the grand jury subpoena described below.

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[1] Joe Doakes is the pseudonym used by the circuit court in this case. For purposes of this petition, the petitioner will use the same pseudonym.

OPINIONS BELOW.

The opinion and judgment of the United States Court of Appeals for the First Circuit in *In re Grand Jury Subpoena,* ___ F.3d ___ (1st Cir. 1998) (1998 WL 102593) is reproduced in the Appendix.

JURISDICTION.

The judgment of the United States Court of Appeals for the First Circuit upholding the grand jury subpoena was entered on March 16, 1998. This petition is filed within ninety (90) days of that date. The petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(l).

FEDERAL RULES INVOLVED.

Fed. R. Civ. P. 26(c) provides as follows:

> Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from an-

noyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened only as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as ware just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

STATEMENT OF THE CASE.

A. *Factual and Procedural History.*

For purposes of this petition, the petitioner will adopt the recitation of the factual and procedural history as set forth in the opinion of the First Circuit Court of Appeals:

> On an undetermined date, Michael Cox, an undercover Boston police officer, was, it is said, beaten brutally by a band of uniformed police officers. To redeem this alleged wrong, Cox sued the City of Boston and several individual officers, including the intervenor in this action, whom we shall call Joe Doakes. [FN omitted] In short order, the City filed a motion—later joined by Doakes—for a protective order pursuant to Fed.R.Civ.P. 26(c). The court (Young, U.S.D.J.) granted this re-

quest and issued a modifiable order that protected confidential information, defined as including "[a]ny and all Internal Affairs Division [(IAD)] records," as well as exhibits or evidence that incorporate any such confidential information. Doakes thereafter gave deposition testimony on three separate occasions between December 29, 1996, and April 7, 1997.

In due season, a federal grand jury initiated an investigation into the attack. On April 4, 1997, the United States moved to intervene in the civil case and to stay discovery. Judge Young granted this motion and, with the consent of all parties, administratively closed the case "until April 1, 1998 or [until] any investigation by the [United States] is completed, whichever comes first."

On September 30, 1997, the grand jury summoned Cox's attorney, Stephen A. Roach. The subpoena duces tecum directed Roach to produce "[a]ll volumes of the deposition, including exhibits, of [Joe Doakes] taken in Michael Cox v. City of Boston, et al." Roach filed a motion requesting the district court to rule whether his compliance with the subpoena would violate the protective order. Citing the administrative closure of the civil case file, Judge Young declined to hear the motion and directed Roach to the district court's emergency calendar. Doakes moved to

> intervene in the proceedings and the duty judge (Gertner, U.S.D.J.) heard Roach's motion for instructions as well as Doakes's motion to quash the subpoena duces tecum.
>
> In pressing the motion to quash, Doakes's counsel—who had not represented him at the start of the civil case—argued that the protective order safeguarded Doakes's entire deposition (and the exhibits associated therewith) because he had been questioned extensively about his statement to the IAD. After some backing and filling, not now germane, Judge Gertner denied the motion to quash. In fashioning her decision, the judge adopted the Second Circuit's balancing test, *see Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979), and determined that, all things considered, the interests of the criminal investigation in this instance outweighed the movant's interest in maintaining the confidentiality of the record (especially since Doakes had demonstrated no prior reliance on the protective order).

In re Grand Jury Subpoena, ___ F.3d at ___ (1998 WL 102593 at 2-4).

Doakes filed a timely notice of appeal and a motion to stay on November 4, 1997. The case was entered on the docket of the First Circuit Court of Appeals on November 18, 1997. On March 16, 1998, the First Circuit issued a deci-

sion affirming Judge Gertner's order. (Selya, Boudin and Lynch, JJ.).

B. *Basis for Federal Jurisdiction in the Courts Below.*

"Federal Rule of Criminal Procedure 17(c) creates a right in specified circumstances to secure relief from a court in the form of an order quashing a grand jury subpoena duces tecum." *In re Grand Jury,* 111 F.3d 1066, 1075 (3rd Cir. 1997). Accordingly, the District Court had jurisdiction to hear the motion to quash and related orders, which are the subject of this appeal. *Id.* at 1075-076.

The Appeals Court had jurisdiction over the petitioner's appeal pursuant to 28 U.S.C. § 1291, which vests in the United States Courts of Appeals jurisdiction of appeals from all final decisions of the district court. Although the denial of a motion to quash a subpoena ordinarily is a nonappealable interlocutory order, a narrow exception exists where the subpoena is directed at a third party who cannot be expected to risk a contempt citation in order to preserve the movant's right to appeal. Under such circumstances, the district court's order is immediately appealable as a final order. *Perlman* v. *United States,* 247 U.S. 7 (1918); *In re Grand Jury Subpoenas,* 123 F.3d 695, 696-97 (1st Cir. 1997); *In re Grand Jury Subpoena,* 119 F.3d 750, 753 (9th Cir. 1997). The instant case presented precisely these circumstances.

REASONS FOR GRANTING THE WRIT.

I. THE RULE ANNOUNCED BY THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT CONFLICTS WITH THE RULES ADOPTED BY OTHER FEDERAL CIRCUITS THAT HAVE CONSIDERED THE ISSUE; FURTHER, THE ISSUE RAISES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

In this case, the First Circuit addressed whether and under what circumstances a grand jury subpoena preempts a protective order in a civil case. Prior to its decision, there was a split of authority among the four circuits that had considered the issue. One circuit had adopted a rebuttable presumption against modifying protective orders. *See Martindell* v. *International Tel. & Tel. Corp.*, 594 F.2d at 295-96. Three circuits had adopted a per se rule that a grand jury subpoena automatically preempts a civil protective order. *See In re Grand Jury Subpoena,* 62 F.3d 1222, 1224 (9th Cir. 1995); *In re Grand Jury Proceedings,* 995 F.2d 1013, 1020 (11th Cir. 1993); *In re Grand Jury Subpoena,* 836 F.2d 1468, 1478 (4th Cir. 1988). The panel in this case rejected both tests and adopted yet a third standard — a "modified per se rule." Under that standard, "[a] grand jury's subpoena trumps a Rule 26(c) protective order unless the person seeking to avoid the subpoena can demonstrate the existence of exceptional circumstances that clearly favor subordinating the subpoena to the protective order." [Slip Opinion at 8].

Far from resolving the disparate positions held by the different circuits, the First Circuit has exacerbated the conflict. The First Circuit criticized the *Martindell* test, which the district judge had applied in this case, as "ill-conceived as a matter of policy[,]" noting "that its creation of a presumption

favoring the sanctity of civil protective orders tilts the scales in exactly the wrong direction." *In re Grand Jury Subpoena*, ___ F.3d at ___ (1998 WL 102593 at 6-7). The First Circuit also criticized the "per se" rule as inflexible to a fault, since it "obviates all analysis" even where circumstances call for exceptional treatment. *Id.* at 7. The panel ultimately characterized both standards "as flawed to some extent[.]" *Id.* at 8.

However, the "modified per se rule" adopted by the First Circuit fares little better as a practical matter than the "per se" rule. As the panel acknowledged, only in rare cases could the target of a grand jury subpoena overcome the strong presumption in favor of grand jury subpoenas. *Id.* at 9. In effect, in the overwhelming majority of cases, the issue of whether a grand jury subpoena trumps a protective order in a civil case would be decided not on the merits but by simple reference to the presumption in favor of grand jury subpoenas.

The petitioner favors the *Martindell* approach and suggests that it gives the appropriate deference to orders of the district court. That is, in order for the government to overcome a protective order issued by a district judge, it should be required to demonstrate exceptional circumstances or a compelling need for the materials. *Martindell* v. *International Tel. & Tel. Corp.*, 594 F.2d at 295-296. *See In re Grand Jury Subpoena Dated April 19, 1991*, 945 F.2d 1221, 1224-225 (2nd Cir. 1991).

Should this court decline to adopt such a rule, the petitioner suggests that a rule that places the protective order and the grand jury subpoena on an even footing would be more appropriate. As noted above, under all three tests articulated by the Circuit Courts, the issue will in most cases be decided on the presumptions. A rule that creates no presumption ei-

ther way would allow the issue to be decided strictly on the merits.

Whichever test is ultimately adopted, the lower federal courts clearly have struggled with this issue and have failed to reach a consensus on the standard to apply. Indeed, the First Circuit acknowledged that the "conflicting precedent" on this issue "compelled" the district court "to guess at the rule of decision[.]" *In re Grand Jury Subpoena,* ___ F.3d at ___ (1998 WL 102593 at 9). Five federal circuits have now attempted to articulate the appropriate rule, and among them, they have announced three different rules. The issue has arisen a number of times and will likely recur until this Court articulates a clear standard for resolving the issue. Further, when the issue does arise, the consequences generally are significant.

Certiorari would be appropriate to promote uniform treatment of similarly situated persons, to resolve a serious conflict among the circuit courts, and to address an important issue that is likely to recur. In these circumstances, the petitioner's petition for a writ of certiorari should be granted.

CONCLUSION.

For the reasons stated above, the writ should be granted and the case set down for argument.

Respectfully submitted,

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By his attorneys,

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Opinion of the United States Court of Appeals for the First Circuit in *In Re: Grand Jury Subpoena*, ___ F.3d ___ (1st Cir. 1998) (1998 WL 102593) 16a

Note:

The petitioner has substituted "Joe Doakes", the pseudonym used by the circuit court in this case, for the petitioner's true name as it appears in the Memorandum issued by the district judge (Appendix A).

APPENDIX A.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE: GRAND JURY SUBPOENA (Joe Doakes Deposition)	)	No. 97-10558-MBD

GERTNER, D.J.:

MEMORANDUM

October 29, 1997

Joe Doakes ("Doakes") has moved to quash a grand jury subpoena duces tecum served upon Stephen A. Roach, Esq. The subpoena seeks a copy of the deposition of Doakes, together with exhibits in the matter of Michael A. Cox, et al. v. The City of Boston, et al., No. 95-12729-WGY.

The principal contention is that the subpoena seeks materials encompassed by an order of Judge Young entered on April 3, 1996, protecting certain materials including a Boston Police Department Internal Affairs interview of Joe Doakes, which was marked as an exhibit at Doakes' deposition.[1] The protective order provided, in pertinent part:

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[1] Mr. Doakes also claims that he has a Fifth Amendment privilege that attaches to the production of the subpoenaed documents. It is clear that there is no such privilege in this case. The statements made by Doakes to the IAD were administratively compelled, see Garrity v. New Jersey, 385 U.S. 493 (1967).Their use in a subsequent criminal proceeding is one thing; a Kastigar hearing would plainly have to be held. Kas-

> 5. The Confidential Information may be exhibited to deposition witnesses during their depositions and they may be questioned with respect to such Confidential Information during oral depositions; provided that to the extent that the transcript of any deposition or the exhibits thereto incorporate the Confidential Information, such transcript and any such exhibit shall be subject to the terms of this Protective Order in the same manner as Confidential Information.

The civil case in which the protective order was entered involved the allegations of Michael Cox that his federal civil rights laws had been violated. Cox was, and is, a Boston police officer who, while in plainclothes, was beaten by members of the Boston Police Department, apparently mistaking him for a fleeing suspect. During the pendency of the civil lawsuit, a federal grand jury was also investigating the assault for potential violations of federal criminal civil rights laws. As a result, the United States filed a Motion to Intervene and Stay Civil Discovery before Judge Young and the Court, with the agreement of the parties, and administratively closed the civil case until April 1, 1998, or until allowance of a motion to reopen the matter.[2]

United States, 406 U.S. 441, (1972). But this is a grand jury proceeding; the Fifth Amendment privilege, embodied in Garrity, does not protect a police officer from the disclosure of internal affairs statements, administratively compelled, to the grand jury. In Re Grand Jury Subpoenas (Albuquerque Police Department), 40 F.3d 1096 (10th Cir. 1994).

[2] The instant motion was originally filed before Judge Young. Judge Young, in conference with the parties, recommended that the motions be

On October 15, 1997, I allowed the motion in part and denied it in part. It was allowed insofar as it applied to documents expressly covered by Judge Young's order; it was denied insofar as it applied to deposition testimony.

Counsel for Mr. Doakes, Thomas Hoopes, sought clarification, taking the position that the protective order covers deposition testimony as well, insofar as the deposition incorporates the confidential information. A narrow interpretation of Mr. Hoopes' position is that the protective order covers instances in which the witness was asked to read portions of covered documents into the record; all other portions, in which the witness is asked to relate generally what happened before the IAD, or to relate the events of the incident in question, would not be covered. Not so, counsel suggests. On the one hand he takes the position that the entire deposition is covered by Judge Young's order: The "order expressly protects the deposition in toto once the document is displayed." On the other hand he suggests, apparently arguendo, that even if there is a more narrow reading, redaction is too cumbersome. I have received the deposition and have reviewed it for the purpose of this memorandum.

The case raises a question of first impression in this Circuit. Four circuits have considered whether to allow the government access to sealed civil discovery material for a criminal investigative purpose. The Ninth Circuit,[3] the Fourth

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[2] The instant motion was originally filed before Judge Young. Judge Young, in conference with the parties, recommended that the motions be filed with the emergency judge, since the civil case was closed and the motion concerned grand jury matters.

[3] United States v. Janey Greeson's A Place for Us (In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes), 62 F.3d 1222 (9th Cir. 1995).

Circuit,[4] and the Eleventh Circuit,[5] have adopted a per se rule that a grand jury subpoena automatically prevails over a validly issued protective order. The Second Circuit has adopted a test that balances competing interests under the specific facts of each case.[6]

For the reasons described below, I find that the Second Circuit test is more appropriate. Based on that test, however, I have reconsidered the original order entirely. I conclude that the grand jury subpoenas should be enforced in this case; the intervenor is ordered to produce the Doakes deposition, together with all exhibits.

A. The Second Circuit Test

The Second Circuit in United States v. Davis, 702 F.2d 418, cert. denied, 463 U.S. 1215 (1983) established a rebuttable presumption against modifying a protective order to facilitate disclosure of materials, otherwise protected, to the grand jury. The government can meet its burden and rebut this presumption using the specific facts of the case to establish improvidence in the grant of the order, extraordinary circumstances, or a compelling need. The rule seems a salutary one for several reasons.

On the one side of the ledger are the goals of the Federal Rules of Civil Procedure to secure efficient and expeditious resolution of disputes. The parties rely on protective orders to enable them to litigate their claims, without necessarily

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[4] In re Grand Jury Subpoena, 836 F.2d 1468 (4th Cir. 1987), cert. denied, 4878 U.S. 1240 (1988).

[5] Williams v. United States, 995 F.2d 1013 (11th Cir. 1993).

[6] Martindell v. IT & T, 594 F.2d 291 (2d Cir. 1979).

exposing them to wider consequences, i.e. the disclosure of trade secrets, privileged or private information.

On the other side of the ledger there is the public interest in obtaining all relevant evidence required for law enforcement purposes. As the Court noted in Davis, 702 F.2d at 421, "[a] grand jury has wide ranging authority to inquire into suspected violations of the criminal law and to effectuate such investigations it may compel the production of documentary evidence or the testimony of witnesses, as it deems necessary . . . Wide latitude in gathering evidence is vital to the grand jury's investigative function."

Neither interest is absolute; neither should be the subject of a categorical rule. A per se rule requiring that grand jury subpoenas always trump protective orders is flawed because it could completely vitiate the protections of such an order. While courts adopting the per se rule, suggest that not much is lost by it, that no one would meaningfully rely on them, see In re Grand Jury Subpoena, 836 F.2d 1475, 1476 (4th Cir. 1987), I disagree.

To be sure, civil litigants facing parallel criminal proceedings understand the limitations of such orders; they cannot immunize their statements from subsequent criminal prosecution; they can be modified as the litigation goes on; they do not provide sufficient immunity to vitiate a valid Fifth Amendment claim. Nevertheless, such an order offers dimensions more protection in most situations than a rule which says that anytime the government wants information protected by a protective order, they can have it. If the government can clearly overcome a protective order without showing any need, parties clearly would be reluctant to waive their privileges in civil litigation. Indeed, a per se rule not only assures parties that if the government wants the in-

formation it will get it, but that the government will be more likely to seek information knowing it is available.

On the other hand, the argument that protective orders must be enforced in the face of grand jury subpoenas is likewise flawed. It amounts to a judicial de facto grant of immunity which is equally inappropriate. The parties cannot, through purely private ordering, withhold important information from the grand jury. It is not their call; other critical interests are at stake.

The Second Circuit balancing test enables the parties to weigh the interests on all sides.

B. Application of the Balancing Test

The protective order was entered on April 3, 1996. It applies expressly to the IAD materials, and only incidentally to a deposition, "to the extent that the transcript of any deposition or the exhibits thereto incorporate the Confidential Information." At first, I had suggested to the parties that they try to redact the deposition, excising any explicit quotes from the IAD materials. Counsel for Doakes demurred; it was too onerous a job, and in any event, all or most of the deposition was implicated.

I have reviewed the deposition and agree that redaction is not necessary under the circumstances. Indeed, on reflection, after reviewing the applicable law, I will reconsider my original finding. Balancing as the Second Circuit suggests, leads to the conclusion that the subpoena should be enforced; the deposition and all exhibits should be produced in toto.

The case was administratively stayed a year after the entry of the protective order because of the grand jury proceedings. It seems likely that the parties entered into the protective order, plainly understanding its limited efficacy, especially with respect to parallel criminal proceedings. Indeed, the very deposition of Joe Doakes which is at issue here contains

references to parallel grand jury proceedings in state and federal court. (See e.g. Transcript, pp. 47-48, April 7, 1997.) Under the circumstances, it makes no sense to suggest that the participants in the Cox matter have relied on the original protective order as against a grand jury subpoena to their detriment.

In fact, as I understand it, one of the parties to the civil action, the City of Boston, would have no problem assenting to the disclosure of the IAD documents, expressly covered by the protective order, so long as it can do so lawfully. I assume that part of the reason for the order protecting the IAD files was to address the City of Boston's concerns for their ongoing internal investigation; if it has no problem with disclosure, the interests undergirding the protective order weigh less heavily in the balance. In fact, the materials under protective order can be disseminated simply with "prior permission of the City of Boston," at the end of the case. Protective Order, p. 4. While the Cox case has not ended, it has been stayed, all parties consenting to the stay. The obvious intent of the stay was to give the government an opportunity to conduct its investigation without the interference of the civil discovery processes, the possibility of multiple demands for information on the same parties, perhaps even inconsistent responses. If both parties have consented to staying the civil case in deference to the criminal investigation, if at least one of the parties has no objection to the disclosure of the core files in the dispute, then enforcement of the civil protective order entered while the case was still active to block access to the Doakes deposition makes little sense.

Moreover, as in Davis, the IAD materials in question existed prior to the litigation. As such, the grand jury could have subpoenaed them before the case began. Id. at 423. As the Court noted in Davis, the records "cannot now be pro-

tected from grand jury review simply because the parties to the agreement saw fit in their own private interests not to reveal this . . . material to the public." Id. at 422. See also In re San Juana State v. Barcello, 662 F. 2d 108 (1981).

For the foregoing reasons, the government's subpoena should be enforced in its entirety.

SO ORDERED. /s/

Dated: October 29, 1997 **NANCY GERTNER, U.S.D.J.**

APPENDIX B.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 95-12729 WGY

MICHAEL A. COX, KIMBERLY COX, M.D., and MICHAEL A. COX, JR. and NICHOLAS COX, by their parents and natural guardians MICHAEL A. COX and KIMBERLY COX, M.D.,

Plaintiffs

v.

THE CITY OF BOSTON, DAVID C. WILLIAMS, JOE DOAKES, and SEVERAL UNKNOWN CITY OF BOSTON POLICE OFFICERS,

Defendants

PROTECTIVE ORDER

Pursuant to Rule 26 of the Federal Rules of Civil Procedure, the parties to this action, by and through their respective counsel, enter into the following Stipulation and Protective Order.

1. With respect to the documents identified in the addendum to be annexed hereto that will hereinafter be produced through discovery, the party producing such documents shall identify or otherwise indicate such documents as being "Confidential Information". Documents containing such confidential information shall be marked as follows:

CONFIDENTIAL

"Pursuant to Court Order in Case Number: 95-12729-WGY in the United States District Court of Massachusetts."

Any party may challenge any other party's designation of a document as Confidential Information upon motion to the Court. Until the Court rules on such motion, the party challenging the designation shall treat it as Confidential Information as provided in this Protective Order.

2. As to the Confidential Information produced or revealed pursuant to Paragraph 1, the parties and their attorneys shall use such Confidential Information only for purposes of this litigation and for no other purposes, and shall not disclose such Confidential Information except to the following described groups of persons:

(i) The Court, in camera or under seal;

(ii) Attorneys of record for the parties, including their investigators, consultants, independent contractors, witnesses, employees directly assisting said attorneys of record and the parties;

(iii) Experts for the parties, provided the attorney of record first informs each expert that such Confiden-

tial Information to be disclosed is confidential, is to be held in confidence and is to be used solely for the purpose of preparing for and presenting evidence in this litigation and further that these restrictions are imposed by a court order.

3. Each of the persons referred to in Paragraph 2(ii) to whom such Confidential Information is to be disclosed shall, prior to the disclosure, be informed of this Protective order, and his or her obligation pursuant to this Order, and he or she shall agree to be bound by the terms of this Order.

4. The attorneys for the parties, their investigators, consultants, independent contractors and their employees and experts may make copies of the Confidential Information as needed in the litigation of this case.

5. The Confidential Information may be exhibited to deposition witnesses during their depositions and they may be questioned with respect to such Confidential Information during oral depositions; provided that to the extent that the transcript of any deposition or the exhibits thereto incorporate the Confidential Information, such transcript and any such exhibit shall be subject to the terms of this Protective Order in the same manner as Confidential Information.

6. Subject only to the applicable rules of evidence, the Confidential Information covered by this Protective order shall be freely available for use at trial by any party.

7. By signing this Protective Order the parties and their counsel specifically agree that any claim of privilege, confidentiality or admissibility into evidence is not waived or otherwise compromised.

8. Upon final termination of the above-entitled action whether by verdict, settlement, dismissal or other disposition, the provisions hereof relating to the Confidential Information shall continue to be binding upon all attorneys of record, their employees, deposition witnesses, experts and others, unless the document becomes part of the public record at trial. After completion of this matter, attorneys for the parties will gather any Confidential Information in the possession of the persons referred to in Paragraph 2(ii). Attorneys for the parties may retain in their files any Confidential Information gathered during the course of this action. The attorneys for the parties, however, will not disseminate or otherwise reveal such Confidential Information after this matter is concluded without (1) judicial approval, (2) service on them of a subpoena, or (3) prior permission from the City of Boston or, if documents concerning the individual defendants is to be disseminated or revealed, prior permission from the individual defendants. In the event that judicial approval is sought or a subpoena is served on any attorney for a party to obtain Confidential Information, such attorney will so notify the party in this action to which it pertains.

9. This Order may be modified by further order of this Court upon application to the Court with notice.

10. Notwithstanding any of the above, nothing shall be filed under seal with the Court without the specific direction of the justice.

11. Parties subject to this Protective Order shall not disclose the Confidential Information to anyone except parties, their attorneys, witnesses and experts

and investigators, consultants and independent contractors.

/s/
United States District Court Judge

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By its attorney,

Merita A. Hopkins
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APPENDIX C.

AO 110 (Rev. 12/89) Subpoena to Testify Before Grand Jury

United States District Court

DISTRICT OF Massachusetts

TO: Stephen A. Roach, Esquire
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Boston, MA

SUBPOENA TO TESTIFY BEFORE GRAND JURY

SUBPOENA FOR:

☐ **PERSON** ☐ **DOCUMENT(S) OR OBJECT(S)**

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States Court at the place, date, and time specified below.

PLACE	COURTROOM
United States Attorney's Office 1003 J.W. McCormack Post Office & Courthouse Devonshire & Milk Streets Boston, Massachusetts 02109	Grand Jury Courtroom 13th Floor DATE AND TIME Thursday, October 16, 1997 10:00 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

All volumes of the deposition, including exhibits, of Joe Doakes taken in

Michael Cox v. City of Boston, et. al.,
Civ. No. 95-12729-WGY

☐ *Please see additional information on reverse*

This subpoena will remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK	DATE
(BY) DEPUTY CLERK /s/	September 30, 1997

This subpoena of the United States of America DONALD K. STERN United States Attorney	NAME ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY S.T. MERRITT (617) 223-9430 Assistant U.S. Attorney 1003 J.W. McCormack Post Office & Courthouse Boston, MA 02109

APPENDIX D.

(Cite as: 1998 WL 102593 1st Cir.(Mass.)))

IN RE: GRAND JURY SUBPOENA (Served Upon Stephen A. Roach, Esquire).
An Anonymous Police Officer, Intervenor, Appellant.

No. 97-2335.

United States Court of Appeals,
First Circuit.

Heard Feb. 5, 1998

March 16, 1998.

Appeal from the United States District Court for the District of Massachusetts [Hon. Nancy Gertner, U.S. District Judge]

Thomas M. Hoopes, with whom Hoopes and Cronin and Dana A. Curhan were on brief, for intervenor.

Louis E. Peraertz, Attorney, U.S. Dep't of Justice, with whom Bill Lann Lee, Acting Assistant Attorney General, Dennis J. Dimsey, Attorney, U.S. Dep't of Justice, Donald K. Stern, United States Attorney, and S. Theodore Merritt, Assistant United States Attorney, were on brief, for respondent.

Before Selya, Boudin and Lynch, Circuit Judges.

SELYA, Circuit Judge.

*1 This appeal requires us to develop a mechanism for modulating the tension that can develop between a protective order in a civil case, see Fed.R.Civ.P. 26(c), and a grand jury subpoena seeking evidence that falls within the protective order's compass. The question arises here on appeal from the district court's refusal to quash a grand jury's subpoena duces tecum that demands the production of materials covered, at least in part, by a previously issued civil protective order. The question presented is new to us, and the decisions elsewhere divide over the correct approach. After pondering the problem, we reject the district court's choice of an analytic method, but nevertheless uphold the subpoena.

I. BACKGROUND

Because of the procedural posture in which this appeal arises, the facts before us afford little expository nourishment. We nonetheless offer the following informational crudite.

On an undetermined date, Michael Cox, an undercover Boston police officer, was, it is said, beaten brutally by a band of uniformed police officers. To redeem this alleged wrong, Cox sued the City of Boston and several individual officers, including the intervenor in this action, whom we shall call Joe Doakes.[1] In short order, the City filed a motion --later joined by Doakes--for a protective order pursuant to Fed.R.Civ.P. 26(c). The court (Young, U.S.D.J.) granted this

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[1] The intervenor originally moved to close the appellate courtroom and to have our opinion issue under seal. We declined to take such extreme measures, but agreed that we would take steps to keep the intervenor's identity confidential. Accordingly, "Joe Doakes" is a pseudonym. All parties have indicated their satisfaction with this arrangement.

request and issued a modifiable order that protected confidential information, defined as including "[a]ny and all Internal Affairs Division [(IAD)] records," as well as exhibits or evidence that incorporate any such confidential information. Doakes thereafter gave deposition testimony on three separate occasions between December 29, 1996, and April 7, 1997.

In due season, a federal grand jury initiated an investigation into the attack. On April 4, 1997, the United States moved to intervene in the civil case and to stay discovery. Judge Young granted this motion and, with the consent of all parties, administratively closed the case "until April 1, 1998 or [until] any investigation by the [United States] is completed, whichever comes first."

On September 30, 1997, the grand jury summoned Cox's attorney, Stephen A. Roach. The subpoena duces tecum directed Roach to produce "[a]ll volumes of the deposition, including exhibits, of [Joe Doakes] taken in Michael Cox v. City of Boston, et al." Roach filed a motion requesting the district court to rule whether his compliance with the subpoena would violate the protective order. Citing the administrative closure of the civil case file, Judge Young declined to hear the motion and directed Roach to the district court's emergency calendar. Doakes moved to intervene in the proceedings and the duty judge (Gertner, U.S.D.J.) heard Roach's motion for instructions as well as Doakes's motion to quash the subpoena duces tecum.

In pressing the motion to quash, Doakes's counsel--who had not represented him at the start of the civil case--argued that the protective order safeguarded Doakes's entire deposition (and the exhibits associated therewith) because he had been questioned extensively about his statement to the IAD. After some backing and filling, not now germane, Judge

Gertner denied the motion to quash. In fashioning her decision, the judge adopted the Second Circuit's balancing test, see Martindell v. International Tel. & Tel. Corp., 594 F.2d 291 (2d Cir.1979), and determined that, all things considered, the interests of the criminal investigation in this instance outweighed the movant's interest in maintaining the confidentiality of the record (especially since Doakes had demonstrated no prior reliance on the protective order).

II. ANALYSIS

*2 We review a district court's fact-based decisions regarding quashal of grand jury subpoenas for abuse of discretion.[2] See In re Grand Jury Matters, 751 F.2d 13, 16 (1st Cir. 1984). Withal, a court that predicates a discretionary ruling on an erroneous view of the law inevitably abuses its discretion. See Koon v. United States, 518 U.S. 81, 116 S.Ct. 2035, 2047, 135 L.Ed.2d 392 (1996); United States v. Snyder, --- F.3d ----, ---- (1st Cir.1998) [No. 97-1233, slip op. at 6-7]. Thus, we review de novo whether the court below employed the proper legal formulation in making the decision from which Doakes appeals. See Snyder, --- F.3d at ---- [slip op. at 71; Soto v. United States, 11 F.3d 15, 17 (1st Cir.1993).

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[2] This appeal does not implicate any Fifth Amendment issues. See, e.g., In re Grand Jury Subpoenas (Albuquerque Police Dep't), 40 F.3d 1096, 1104 (10th Cir. 1994) (holding that the Fifth Amendment does not protect a police officer from the disclosure of internal affairs statements, administratively compelled, to a grand jury).

A. Extant Standards.

The Second Circuit's Martindell test strives to balance society's interest in obtaining grand jury evidence for law enforcement purposes with its interest in "the just, speedy, and inexpensive determination of civil disputes . . . by encouraging full disclosure of all evidence that might conceivably be relevant." 594 F.2d at 295 (citation and internal quotation marks omitted). In constructing this test, the Martindell court exalted civil litigation over criminal prosecution on the theory that a deponent's reliance on a protective order merits respect, and the government's evidence-gathering powers are so sweeping that it ordinarily will be "unnecessary" for prosecutors to go behind civil protective orders. Id. at 296. In deference to these considerations, the court declared that, absent a showing of "improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need . . . a witness should be entitled to rely upon the enforceability of a protective order against any third parties, including the Government." Id. The Second Circuit's rule--positing a presumption in favor of a protective order when such an order clashes with a grand jury subpoena--has received a cool reception elsewhere. The Fourth Circuit declined to follow Martindell, holding instead that "the existence of an otherwise valid protective order [is] not sufficient grounds to quash the subpoena duces tecum issued by the . . . grand jury." In re Grand Jury Subpoena, 836 F.2d 1468, 1478 (4th Cir.1988). The court adopted this per se rule after weighing "the authority of a grand jury to gather evidence in a criminal investigation; the deponents' right against self-incrimination; and the goals of liberal discovery and efficient dispute resolution in civil proceedings." Id. at 1471. Calibrating these scales, the court concluded that society's inter-

est in grand jury access to all relevant information overrode any countervailing interest in civil discovery. See id. at 1474-75. Two other circuits have joined the fray, both siding with the Fourth Circuit and advocating a per se rule that invariably prefers grand jury subpoenas over civil protective orders. See In re Grand Jury Subpoena, 62 F.3d 1222, 1224 (9th Cir.1995); In re Grand Jury Proceedings, 995 F.2d 1013, 1020 (11th Cir.1993).

*3 We are uneasy with both of these approaches. Turning first to Martindell, we believe that its creation of a presumption favoring the sanctity of civil protective orders tilts the scales in exactly the wrong direction. By establishing a presumption in favor of civil protective orders, Martindell fails to pay proper respect to what we deem an issue of great importance: society's profound interest in the thorough investigation of potential criminal wrongdoing. See Nixon v. Fitzgerald, 457 U.S. 731, 754 n. 37, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982) (explaining "that there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions"). Furthermore, the Martindell rule suffers from practical infirmities: the principles by which one court should adjudge a protective order issued by another court "improvidently granted" are difficult to standardize, and the circumstances under which a United States Attorney might demonstrate a "compelling need" are opaque. In short, the Martindell rule is ill conceived as a matter of policy.

The Fourth Circuit's per se rule manifests a different vice: inflexibility. Although the per se rule properly privileges the public's interest in law enforcement over its interest in the resolution of civil controversies, it does so without regard to idiosyncratic circumstances. In other words, this approach puts priorities in proper perspective, but overlooks that the balance nonetheless is variable and that the confluence of the

relevant interests-- generally, those of society at large and of the parties who are seeking to keep a civil protective order inviolate--occasionally may militate in favor of blunting a grand jury's subpoena. Because this per se rule obviates all analysis, it will trench upon legitimate concerns when (even if rarely) a solid case can be made for exceptional treatment. Always bringing overwhelming force to bear may be acceptable military strategy, but the law often requires a more nuanced approach.

B. The Modified Per Se Rule.

Regarding both the Martindell rule and the per se rule as flawed to some extent, we chart a different course. The proper approach, we think, is along the following lines: A grand jury's subpoena trumps a Rule 26(c) protective order unless the person seeking to avoid the subpoena can demonstrate the existence of exceptional circumstances that clearly favor subordinating the subpoena to the protective order.

We believe that this rule offers the desired flexibility and at the same time allows room for reasoned analysis in a way that does not undermine the public's interest in law enforcement out of a misplaced deference to private parties. See Ajit V. Pai, Comment, Should a Grand Jury Subpoena Override a District Court's Protective Order?, 65 U. Chi. L.Rev. 317 (1997) (espousing a similar rule).

*4 How this presumption in favor of a grand jury subpoena plays out in each individual case will depend upon the particular facts and circumstances. When called upon to adjudicate a motion to quash a grand jury subpoena in the face of a civil protective order, a district court may mull factors such as the government's need for the information (including the availability of other sources), the severity of the contem-

plated criminal charges, the harm to society should the alleged criminal wrongdoing go unpunished, the interests served by continued maintenance of complete confidentiality in the civil litigation, the value of the protective order to the timely resolution of that litigation, the harm to the party who sought the protective order if the information is revealed to the grand jury, the severity of the harm alleged by the civil-suit plaintiff, and the harm to society and the parties should the encroachment upon the protective order hamper the prosecution or defense of the civil case.[3] In the end, society's interest in the assiduous prosecution of criminal wrongdoing almost always will outweigh its interest in the resolution of a civil matter between private parties, see, e.g., Nixon, 457 U.S. at 754 n. 37, and thus, a civil protective order ordinarily cannot be permitted to sidetrack a grand jury's investigation.[4]

C. The Remedy.

We are mindful that the district court, compelled by conflicting precedent to guess at the rule of decision, applied the wrong legal standard. Ordinarily, such a chain of events counsels in favor of a remand. Yet, when a trial court misperceives the applicable rule of law, remand is not always

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[3] This list is intended to be illustrative rather than all encompassing; the district court need not consider every factor we have mentioned in every case, and, by the same token, may add factors as necessary.

[4] Still, there may be occasional exceptions, and though we eschew any speculation as to what circumstances might warrant subordinating a grand jury subpoena to a civil protective order, we note that one commentator has ventured some ideas on this subject. See Pai, supra, at 340-44 (suggesting that perhaps bankruptcies, financial institution insolvencies, mass torts, and the like might merit special consideration).

required. If the record is sufficiently informative and the court has made sufficiently detailed findings, it sometimes is possible for an appellate tribunal to take those findings, marry them to the correct rule of law, and render a decision. See, e.g., United States v. Pierro, 32 F.3d 611, 622 (1st Cir.1994); Societe des Produits Nestle v. Casa Helvetia, Inc., 982 F.2d 633, 640-41, 642 (1st Cir.1992); United States v. Mora, 821 F.2d 860, 869 (1st Cir.1987). This is such a case. The record yields all the information a court is likely to need in order to rule upon a motion to quash. In addition, Judge Gertner made certain relevant findings.[5] More importantly, the record is barren of any evidence that would permit a court to find exceptional circumstances, or that might tend to show that the public interest would be served by taking the unusual step of preferring the civil protective order over the grand jury subpoena. The subpoenaed information is highly relevant, the contemplated criminal charges are serious, the need for deterrence is great, the public interest in prosecuting police brutality cases is obvious, and, conversely, a limited incursion on the protective order will neither delay the civil litigation (which is stayed) nor unfairly skew its outcome.

*5 We will not paint the lily. Remand would serve no useful purpose because the record presents insurmountable ob-

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[5] For instance, Judge Gertner concluded that the protective order--which permits the dissemination of protected materials with "prior permission of the City of Boston" at the end of the civil case--could not reasonably be privileged over the subpoena because it was modifiable to such an extent that no one reasonably should have relied upon it as a buckler against a grand jury inquiry. She also found that a principal purpose behind the protective order was to avoid interference with the City of Boston's internal investigation, now concluded. Finally, the City did not object to the grand jury subpoena, thereby weakening the aggregate interest in maintaining confidentiality.

stacles for Doakes. Indeed, even though Judge Gertner erroneously used a legal standard much more congenial to Doakes's position--a legal standard which incorrectly presumed that a protective order ordinarily would prevail over a grand jury subpoena--she found that the subpoena should be enforced. As the correct legal standard treats grand jury subpoenas with considerably more respect than the standard employed below, and as the judge's findings of fact are entirely supportable, the subpoena's survival is assured. We need go no further. Affirmed.